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NO. A-1017

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CRAIG A. WASHINGTON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S PETITION FOR CERTIORARI

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

WHETHER THE DISTRICT COURT'S FAILURE TO COMPLY WITH THE NOTICE REQUIREMENTS FOR CONTEMPT PROCEEDINGS SET FORTH IN RULE 42(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE DENIED RIGHTS SECURED TO PETITIONER BY THE DUE POCESS CLAUSE OF THE FIFTH AMENDMENT.

WHETHER ATTORNEYS ARE DENIED EQUAL PROTECTION OF THE LAW BY THE REQUIREMENT THAT THEY NEGATE INTENT, AN ELEMENT OF CONTEMPT, WHEN THIS BURDEN IS NOT IMPOSED ON LAYPERSONS SIMILARLY SITUATED.

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OPINION BELOW

The Opinion of the Court of Appeals below (Appendix A, *infra*) is reported in 730 F.2d 253 (5th Cir. 1984). The order entered in the case below in District Court (Appendix B, *infra*) was not reported.

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the Court below (Appendix C, *infra*) was entered on April 19, 1984. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

2. The Fourteenth Amendment, § 1, United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The statute under which Petitioner was punished was Federal Rules of Criminal Procedure, Rule 42, which provides as follows:

> (a) SUMMARY DISPOSITION. A criminal contempt may be punished if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual pres-

ence of the Court. The order of contempt shall recite the facts and shall be signed by the judge and entered on record.

(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the Defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The Defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the Defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

4. The statute granting to Court the authority to punish for conduct constituting contempt is 18 U.S.C. § 401, which provides as follows:

§ 401. POWER OF COURT

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transaction;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

STATEMENT OF THE CASE

A. Course of Proceedings in the Rule 42 Case Now Before This Court.

On April 22, 1983, in a cause then pending in the United States District Court for the Southern District of Texas, Houston Division, entitled, United States of America vs. Craig Washington, Petitioner was held in contempt of Court by The Honorable John Singleton, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure.

On the same date referred to above, the District Court entered judgment and fined Petitioner $1,400.00. The judgment and fine assessed was affirmed by the Court of Appeals for the Fifth Circuit in United States of America vs. Miki Eze Onu, Craig A. Washington, No. 83-2270, 730 F.2d 253 (5th Cir. 1984).

B. Relevant Facts Concerning the Underlying Contempt Conviction.

Petitioner failed to appear in Court on April 18, 1983. As a result of this failure to appear, Petitioner, on April 22, 1983, was held in contempt of Court. The rule cited by the Court as supporting the contempt was Rule 42(a) which governs contempts committed in the actual presence of the Court. During the proceedings in District Court, the Honorable John Singleton, presiding judge, recited

the facts which lead to the proceedings. (Appendix D, *infra,* pp. D-3 - D-8).

Prior to the hearing on April 22, 1983, an order of arrest was issued for the Petitioner. This order of arrest was later rescinded after a telephone conversation between the judge and the Texas Attorney General, Jim Mattox. As a result of this telephone conversation, it was also agreed that Petitioner would be present in the District Court on April 22, 1983. Petitioner was not present during the conversation and since the order of arrest was rescinded, there was neither sufficient personal contact nor notice to the Petitioner of the nature of the proceedings.

During the contempt hearing in District Court, the judge also admitted surprise by the Petitioner's actions and in response to the judge's disappointment, the Petitioner responded that he never intended to disrespect the Court. Nevertheless, the Petitioner was held in contempt pursuant to Rule 42(a) which controls summary disposition of contemptuous conduct committed in the Court's actual presence. On April 27, 1983, the District Court entered its order holding Petitioner in contempt pursuant to Rule 42(a).

The Court of Appeals while affirming the contempt conviction did concede that the District Court had erred in designating the conduct of non-appearance, a contempt punishable pursuant to Rule 42(a). The rule among the various circuits is that absence from a scheduled Court appearance is not punishable summarily as conduct committed in the Court's actual presence. It was also determined on appeal that the United States Attorney's position that a hearing was provided was untenable.

However, due to Petitioner's failure to show prejudice from the lack of notice, the judgment was affirmed.

Another factor which the appellate Court deemed as supporting the conviction was Petitioner's failure to attempt to communicate with the District Court prior to the date set for Court appearance. The appellate Court indicates that in arguing his case before that Court, Petitioner asserted that he made some attempt to reach the Court, but failed to assert this in District Court. (Appendix A). This assertion or assumption by the Court of Appeals is incorrect as is disclosed by an examination of the proceedings held in District Court on April 22, 1983. The Petitioner did in fact attempt to communicate with the Court prior to the scheduled Court appearance and during the proceedings informed the Court of this fact. (Appendix D, *infra*, p. D-14).

Petitioner, in addition to attempting to contact the Court, arranged for the appearance of one of his law partners at the scheduled trial. Petitioner's attempts to secure the services of his law partner and attempts to contact the Court, though deemed by the District Court to be erroneous substitutes were plausible alternatives which negate the intent required for contempt. The lack of requisite intent needed to sustain the conviction is also demonstrated in the Petitioner's address to the Court in which he apologizes for any dishonor that he may have brought upon the Court.

EXISTENCE OF JURISDICTION

Petitioner was held in contempt of Court in the United States District Court for the Southern District of Texas, Houston Division, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure.

The Court of Appeals for the Fifth Circuit in affirming the judgment rendered by the District Court has departed from the accepted and usual course of judicial proceedings, and has sanctioned such departure by the lower Court, as to call for the exercise of his Court's power of supervision.

SUBSTANTIALITY OF QUESTIONS PRESENTED

This is a contempt case in which the attorney of record was fined for the failure to appear for a scheduled Court appearance. This case raises questions concerning specifically, compliance with the notice requirements of Federal Rule 42(b) as applied to the facts of this case. Another question resolved by the Court of Appeals' determination is that the manner in which such proceedings are conducted and the burden of proof required depends upon whether the contemnor is a layperson or an attorney. Attorneys must make a showing of conduct that tends to negate intent, which is a necessary element of a criminal contempt. This shifts the burden of proof to attorneys based upon their position of employment when other persons do not have this burden. In cases involving the possible imposition of fine or imprisonment for contempt involving laypersons, the State is still required to prove every element of the offense beyond a reasonable doubt. While the Petitioner here recognizes the Court's interest in the efficient administration of cases before it, and his responsibilities as an "officer of the Court", the need for efficient administration should never outweigh the individual's right to notice and presumption of innocence regardless of his position. The opinions in the Courts below apparently ignore those time-honored principles that have been upheld in this Court.

The Court's interest in maintaining the order of the Court and the efficient administration of justice is consistent with the power given to Courts to punish contemptuous conduct. However, the Court's interest would still be protected and undisturbed by requiring the same type of notice and burden of proof as to all persons accused of contempt. Stated another way, there is no federal interest consistent with the grant of authority to Courts to punish disruptive conduct, that is rationally related to either allowing lesser notice to attorneys, or requiring attorneys to negate an element of the offense.

a) The failure of the lower Courts to recognize lack of notice as a denial of due process in this proceeding.

The decisions of the District and appellate Courts here deviate from constitutional principles embodied in due process which include notice of the charges, and were erroneous in the following respects:

The District Court here issued an order of arrest in the Petitioner's absence. This order of arrest, which the Petitioner is entitled to as a means of being notified of the charges, never reached the Petitioner. This order issued on April 18, 1983 was later rescinded when the Attorney General for the State of Texas, Jim Mattox, intervened on the Petitioner's behalf. As a result of this intervention, Petitioner was to appear before the District Court on April 22, 1983.

Prior to April 22, 1983, Petitioner, who was in Austin, Texas, carrying out his duties as a duly elected member of the State senate, never received actual knowledge of the nature of the proceedings to be held. Petitioner, who never received actual notice as required by Federal Rule

of Criminal Procedure 42(a) of the nature of the proceedings, did not know whether civil or criminal contempt charges were being contemplated or whether contempt would be charged at all. While it is admitted that this lack of notice was not mentioned at the hearing in Federal District Court, the issue was raised on appeal and the Court of Appeals agreed with Petitioner that he had no notice. 730 F.2d 256. The Court of Appeals for the Fifth Circuit, despite its acknowledgement that no notice was given, held that the notice requirements were not designed to be vigorously enforced when no prejudice is shown. The appellate Court found support for the proposition that failure to comply with Rule 42(b) will not overturn a contempt conviction absent prejudice in *Hopkins v. Jarvis,* 648 F.2d 981 (5th Cir. 1981); *F.T.C. v. Gladstone,* 450 F.2d 913 (5th Cir. 1971); *Wolfe v. Coleman,* 681 F.2d 1302 (11th Cir. 1982).

The above referenced circuit decisions relied upon by the Fifth Circuit Court of Appeals are in direct opposition to the cases reversing contempt convictions for violations of procedural due process that have been rendered by this Court. As was determined by this Court in *In Re Oliver,* 333 U.S. 257 (1948),

> If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires that the accused be accorded notice and a fair hearing.

Furthermore, the position taken below that lack of notice will not be the basis of reversal of a contempt conviction is in opposite to *Taylor v. Hayes,* 418 U.S.

488 (1974). This case involved a post-trial contempt "hearing" in which an attorney, after the verdict had been rendered against his client in a criminal case, was held in contempt and punished by imprisonment. During the course of the trial, the attorney was told that the Court was holding him in contempt. But no sentence was imposed during trial and the adjudication of contempt was not entered until after the verdict. Even though the conduct occurred in the Court's presence the Supreme Court reversed because, *inter alia,* there were no extenuating circumstances which justified finding the Petitioner in contempt summarily without notice and hearing. Furthermore, since the trial was over, there was no reason why notice of the exact charges could not have been served upon Petitioner in that case.

The contempt charges were set aside because minimum requirements of due process were not extended to the Petitioner in that case. This Court has stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment can be imposed is a "basic in our system of jurisprudence." *Groppi v. Leslie,* 404 U.S. 496, 502 (1972), quoting *In Re Oliver, supra.* Nothing in the standard requiring notice implies that a full plenary trial of contempt charges initiated by indictment is required, but reasonable notice is mandated due to the potential for abuse in criminal contempt cases. The additionl time and expense possibly involved in serving notice upon an alleged contemnor would not, in this case or in any other case, seriously handicap the effective functioning of the Courts. "The provision of fundamental due process protections for a contemnor accords with our historic notions of elementary fairness." *Taylor* at 500.

b) The burden of proof in a contempt hearing varies on the basis of whether the contemnor is an attorney or a layperson.

The criminal contempt is established when there is a clear and definite order of the Court, the contemnor knows of the order, and the contemnor willfully disobeys the order. *Chapmann v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 195 (9th Cir. 1979).

Willfulness, for the purposes of sustaining a criminal contempt charge implies a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation. *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770 (9th Cir. 1983); *In Re Joyce*, 506 F.2d 373, 376 (5th Cir. 1975). The minimum requisite of intent for criminal contempt has also been defined as, "a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." *U.S. v. Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974).

Willfulness is, of course, and as has been stated, an element of criminal contempt. As an element of a criminal offense, it is imperative that the State prove that element beyond a reasonable doubt. In *United States v. Columbia Broadcasting System*, 497 F.2d 107 (5th Cir. 1974), it was stated that ". . . although contempt proceedings may be initiated by the judge on his own motion, the prosecution taken over by Government attorneys, nevertheless the government must prove a charge of criminal contempt beyond a reasonable doubt." See also: *Craig v. Harney, Sheriff*, 331 U.S. 367 (1947); *Nye v. United States*, 313 U.S. 33 (1941) (in proceeding as for criminal contempt, the Defendant-Respondent must be accorded all of the protections due one facing a tradi-

tional trial of a criminal offense charged by indictment); *In Re Weiss,* 703 F.2d 653 (2nd Cir. 1983); *U.S. v. Powers,* 629 F.2d 619, 626, n.6 (9th Cir. 1980); *In Re Van Metter,* 413 F.2d 536 (8th Cir. 1969); *Yates v. United States,* 316 F.2d 718, 725 (10th Cir. 1963) (stating alleged contemnor is at all times "clothed with the presumption of innocence" and the Government has the continuing burden of proving his guilt); and *Cliett v. Hammond,* 305 F.2d 565, 570 (5th Cir. 1962).

The cases above were all cases involving the filing of criminal contempt charges against lay persons. *In Re Van Metter,* involved a challenge to a contempt order initiated by a show cause order. The Appellant then contended that the show cause order shifted the burden of proof to the Petitioner and was violative of his due process rights. The Court disagreed with his contention and indicated that the show cause order merely served as a method of serving notice but that the State had proven the Appellant's intent to commit the offense. As distinguished from this case, it is the contention of the Petitioner that requiring attorneys to show conduct inconsistent with contempt shifts the burden of proof to them as a class.

Language which seems to shift the burden of proof to attorneys as a class to prove their innocence in contempt proceedings may be found in *In Re Allis,* 531 F.2d 1391, 1392 (9th Cir. 1976). That case involved an attorney's tardiness to a scheduled Court appearance. Contempt in that case was inferred from the attorney's conduct in consistently being tardy. The Court held a hearing in which the attorney was to explain his tardiness and required the attorney to make an explanation that would

be inconsistent with willful disobedience. *Id.* at 1392. The Court there went on to say that if the attorney's explanation was accepted there would be no contempt. Justification for requiring an attorney's explanation to negate an element of a criminal offense is found in the recognition by the Court of an attorney as "an officer of the Court." There is, however, authority for the proposition that an attorney is not an officer of the Court in the strictest sense in which that term may be understood.

Contrary to the position taken in *Allis* imposing upon attorneys duties as officers of the Court is the position taken by the Supreme Court in *Cammer v. United States,* 350 U.S. 399 (1956) and *In Re Griffiths,* 413 U.S. 717 (1973). *Cammer* was a situation in which an attorney had sent a questionnaire to a District of Columbia grand jury. The attorney was held in contempt of Court pursuant to 18 U.S.C. § 401(2) which grants to the Courts of the United States the power to punish for contempt "(2) misbehavior of any of its officers in their official transactions." The Supreme Court there held that lawyers are not officers of the kind subject to proceedings under that section. The Court pointed out that an attorney is not an "officer" within the ordinary meaning of that term. "Certainly nothing that was said . . . in any other case decided by this Court places attorneys in the same category as marshalls, bailiffs, court clerks or judges. Unlike these officials, a lawyer is engaged in a private profession, important though it is to our system of justice." *Id.* at 459.

It may be conceded that a lawyer, though not an officer of the Court in the sense in which that term is ordinarily understood, is held to a different, higher standard than the average person. However, requiring an attorney to

negate his guilt denies an attorney due process of law and equal protection in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Though the Fifth Amendment contains no equal protection clause and the Fourteenth Amendment applies to actions by States, whether embodied in either amendment, the guaranty of equal protection means that no person or class of persons shall be denied the same protection of law which is enjoyed by other persons or other classes in like circumstances. *Carleton Screw Products Co. v. Fleming,* 126 F.2d 537, *cert. denied,* 317 U.S. 634 (1927).

In conclusion, it is apparent that the procedure used in filing and sustaining criminal contempt charges pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure against attorneys violates their due process rights to a presumption of innocence as is allowed to lay persons accused of the offense. This required showing also violates their rights to equal protection under the laws because it places a burden on attorneys which is not placed on lay persons accused of criminal contempt.

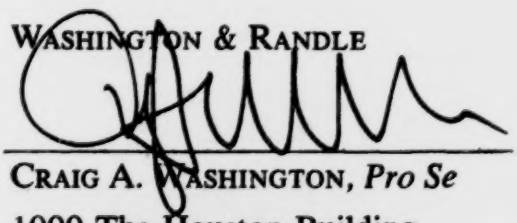
CONCLUSION

The judgment below substantially deviates from decisions in this Court requiring that an alleged contemnor or person subject to criminal sanctions be given reasonable notice of the charges. The decisions of the circuit courts also show a practice in contempt proceedings of unconstitutionally requiring attorneys to disprove an element of the offense. Neither failing to require notice or shifting the burden of proof to attorneys is rationally related to the Court's interest in efficient administration

of the Courts through the use of contempt power. The Court's decision below allows the Court's administrative interest in the due progression of its docket to outweigh the individual's rights to constitutionally-secured protections. This petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

WASHINGTON & RANDLE

By: 

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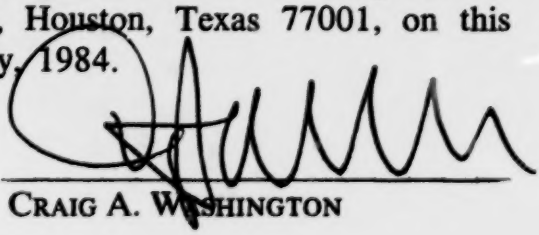
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Certiorari was mailed by Certified Mail, Return Receipt Requested, to Mr. Daniel K. Hedges, United States Attorney who represents the United States of America in this cause, at his correct mailing address of 515 Rusk Avenue, Houston, Texas 77001, on this the 19 day of July, 1984.



CRAIG A. WASHINGTON

APPENDICES

Opinion Below ..... Appendix A

District Court Order ..... Appendix B

Judgment of Court of Appeals ..... Appendix C

Transcript of Proceedings in District Court Appendix D

APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,

v.

Miki Eze ONU, Defendant,

Craig Washington, Appellant.

No. 83-2270.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

April 19, 1984.

Defendant-lawyer appealed from a decision of the United States District Court for the Southern District of Texas, John V. Singleton, Jr., Chief Judge, which convicted him of criminal contempt. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) failure of a lawyer to appear for a trial is not a contempt committed in presence of the court, and (2) since defendant-lawyer, who had adequate notice in fact, suffered no prejudice by court's failure to give him notice in writing of contempt charge and did not raise the issue of lack of notice in trial court, his contempt conviction, which was based on his failure to appear in court, would not be overturned on appeal.

Affirmed.

Craig A. Washington, pro se.

Mary F. Keller, Asst. Atty. Gen., Austin, Texas, for amicus State of Tex.

James R. Gough, Asst. U.S. Atty., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN, JOHNSON and DAVIS, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The failure of a lawyer to appear for a trial is not a contempt committed in the presence of the court. Therefore it may be prosecuted only on notice, as prescribed by Fed. R. Cr. P. 42(b), stating the essential facts constituting the criminal contempt charged. In this case, however, the lawyer had adequate notice in fact, suffered no prejudice by the court's failure to give him notice in writing, and did not raise the issue of lack of notice in the trial court. Therefore, we affirm his conviction and sentence to pay a fine equal to the cost of summoning the jury whose attendance he made fruitless.

Craig A. Washington is a member of the Texas bar, admitted to practice in the United States District Court for the Southern District of Texas. An experienced lawyer, he is also a member of the Texas State Senate. He was retained to represent Miki Eze Onu, who had been indicted for conspiracy to violate the firearms statute and for dealing in firearms without a license. Onu, who was in federal custody, had previously been represented by other counsel. When he was arraigned on February 28, the court entered a docket control order scheduling a

pretrial conference on April 13 and fixing trial for April 18 at 9:30 a.m. Senator Washington sought to be substituted as counsel on March 10, but the court, in accordance with its usual procedure, refused to approve the replacement until the defendant's consent was obtained. This was filed on April 11, so on April 12, Senator Washington's motion to be substituted as counsel for Onu was granted.

Meanwhile, on April 8, the courtroom deputy spoke with Senator Washington, advising him that the pretrial conference had been rescheduled for April 15 at 9:30 a.m. Washington agreed to this date. On Friday, April 15, Senator Washington did not appear at the pretrial conference, but Melvin Lampley, a lawyer associated with him, came to the conference and stated that Washington would like a continuance because he was at a legislative session. The court informed Lampley that the Texas statute relieving legislators from attendance at court during legislative sessions[1] was not applicable to federal courts; the case was set for trial on Monday, April 18; and it would be necessary for Washington to communicate with the court.

Senator Washington states in oral argument that he attempted to telephone the court but was unable to reach Chief Judge Singleton. He left a message on a telephone recording device, and Chief Judge Singleton's courtroom deputy returned his telephone call about 4:45 p.m. on Friday. She informed him that his motion for a continuance would be denied and the trial would begin on Monday. Washington states that he then informed her that he would not be present Monday and would file a motion

1. Art. 2168a, V.A.T.S.

to withdraw as counsel. The same day Washington filed a motion for a continuance asking that the case be postponed until at least thirty days after the adjournment of the regular session of the Texas legislature.

On Monday, at 9:30 a.m., the court held another pretrial conference. Chief Judge Singleton then learned personally for the first time that Washington was not present and did not plan to be. The prosecuting attorneys were present and were ready to proceed. A jury venire of thirty-five persons had been called. Lampley was also present. Instead of the motion that Washington had mentioned in his conversation with the courtroom deputy, Lampley filed a motion on behalf of Washington to withdraw as counsel because Onu had failed to pay the fee due. The motion was denied. The court then telephoned the Chief Deputy United States Marshal and issued an order "to bring the body of Craig Washington before this court instanter."

Later that day the Attorney General of the State of Texas requested that the order to arrest Senator Washington be withdrawn. The court agreed to do so with the understanding that Washington would be present in court on Friday, April 22. On that date, Washington appeared in court. The court reviewed events, as they are set forth above. During the review of the facts, the court noted that Washington had offered no reason for his failure to communicate with the court or to be present for trial other than his status as a state senator and his client's failure to pay the fee. The court then asked Washington whether he had anything to say. Washington offered no explanation or excuse. The court then advised Washington that it had "no alternative but to hold [him] in contempt in accordance with Rule 42(a)" and to punish him summarily for a contempt committed in the actual pres-

ence of the court. Washington did not object to the procedure. The court advised him that he would be fined $1,400, the estimated cost of summoning the juror venire. Washington asked only, "To whom should I make the check payable?" The court then entered an order finding that Washington was in contempt of court "in that he failed to appear and represent his client on April 18, 1983, in accordance with the Court's directive," and that the contempt had occurred in its presence.

[1] The procedures for summary disposition of contempt charges are reserved " 'for exceptional circumstances,' . . . such as acts threatening the judge or disrupting a hearing or obstructing court proceedings." *Harris v. United States,* 382 U.S. 162, 164, 86 S.Ct. 352, 354, 15 L.Ed.2d 240 (1965). "Summary contempt is for 'misbehavior' . . . in the 'actual presence of the court.' " *Id., quoting Ex parte Terry,* 128 U.S. 289, 314, 9 S.Ct. 77, 83, 32 L.Ed. 405 (1888). "Rule 42(b) provides the normal procedure." *Harris v. United States, supra,* 382 U.S. at 165, 86 S.Ct. at 355, 15 L.Ed. at 243.

[2] A lawyer's failure to attend court is not a contempt in the presence of the court.[2] Although the facts of absence and the scheduling of the hearing are within the knowledge and presence of the court, absence alone

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2. *Thyssen v. S/S Chuen On,* 693 F.2d 1171 (5th Cir. 1982); *In re Allis,* 531 F.2d 1391 (9th Cir.), *cert. denied,* 429 U.S. 900, 97 S.Ct. 267, 50 L.Ed.2d 185 (1976) (tardiness); *United States v. Delahanty,* 488 F.2d 396 (6th Cir. 1973) (failure to appear for pretrial conference); Contra: *In re Niblack,* 476 F.2d 930 (D.C. Cir.), *cert. denied,* 414 U.S. 909, 94 S.Ct. 229, 38 L.Ed.2d 147 (1973) (distinguishing *Klein* [*v. U.S.,* 151 F.2d 286 (C.A. D.C. 1945)], and finding that the lawyer's disobedience to an order that he be in court at a specified hour subject him to discipline pursuant to Rule 42(a)); *Sykes v. United States,* 444 F.2d 928 (D.C. Cir. 1971); See Annot. 97 A.L.R.2d 41 (1964).

is not contempt.[3] Contempt results only from the lack of a good reason for the lawyer's absence. No contempt has been committed if the absence is excusable because it was occasioned by good cause.[4] Ordinarily, therefore, Rule 42(a) may not be used to punish a lawyer for absence from a scheduled court appearance. *Thyssen, Inc. v. S/S Chuen On,* 693 F.2d 1171 (5th Cir. 1982).[5]

The requirements of the rule were not inventions of the Advisory Committee. The Supreme Court had long held that a court may proceed summarily only for "direct contempts committed in its presence." *Ex parte Terry,* 128 U.S. 289, 314, 9 S.Ct. 77, 83, 32 L.Ed. 405, 412 (1888). *See also Harris v. United States,* 382 U.S. 162, 164-167, 86 S.Ct. 352, 354-355, 15 L.Ed.2d 240, 242-244 (1965). Rule 42(b) thus codifies prior doctrine limiting the summary contempt power to cases in which the contempt is committed directly under the eye or within the view of the court. *United States v. Wilson,* 421 U.S. 309, 95 S.Ct. 1802, 44 L.Ed.2d 186, (1975).[6]

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3. *Thyssen, Inc. v. S/S Chuen On, supra,* n. 2, 693 F.2d 1171 (5th Cir. 1982); *In re Allis, supra* n. 2, 531 F.2d at 1392.

4. *In re Monroe,* 532 F.2d 424, 425 (5th Cir. 1976); *In re Marshall,* 423 F.2d 1130 (5th Cir. 1970); *In re Adams,* 505 F.2d 949 (5th Cir. 1974).

5. In *Thyssen, supra,* n. 2, we said:

> It is at least possible that in some instances of absence or tardiness the reason may be known to the court. Counsel may advise the court that he will not appear for a certain reason, or he may advise the court why he was absent. In such instances, it may be that all the procedures of Rule 42(b) need not be followed.

Despite this observation, we consider ourselves bound in this case by the requirements of Rule 42(b).

6. *See also Johnson v. Mississippi,* 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971); *United States v. Powers,* 629 F.2d 619, 625 (9th Cir. 1980); *In re Chaplain,* 621 F.2d 1272, 1275 (4th Cir. 1980), *cert. denied,* 449 U.S. 834, 101 S.Ct. 106, 66 L.Ed.2d 40

The United States Attorney seeks to uphold the court's action on the basis that a hearing was provided and Washington had in fact received notice of its purpose. But actual notice does not satisfy the rule. Rule 42(b) explicitly requires: "The notice *shall* state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and *shall* state the essential facts constituting the criminal contempt charged *and describe it as such.* The notice *shall* be given orally by the judge in open court in the presence of the defendant or . . . by an order to show cause or an order of arrest." (Emphasis added.) Thus, "the notice also serves as the charge." 8B Moore's Federal Practice, ¶ 42.04 (2d ed. 1976).

[3] But rules are not designed to be enforced mechanically when no prejudice results from their nonobservance. In *United States v. United Mine Workers,* 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947), the Court held that Rule 42(b) does not require rigorous and formalistic application. The defendants in that case had received notice of contempt proceedings against them but were not formally apprised of their criminal nature. The Court found that the defendants indeed had actual knowledge of the real nature of the proceedings, notwithstanding the lower court's procedural oversight. The defendants had failed to show that non-observance of the rule substantially prejudiced them. Therefore, the Court upheld the contempt judgment. The circuit courts have since adhered

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(1980); *United States v. Peterson,* 456 F.2d 1135, 1139 (10th Cir. 1972); *In re Lamson,* 468 F.2d 551 (1st Cir. 1972), *United States v. Willett,* 432 F.2d 202 (4th Cir. 1970); *Matusow v. United States,* 229 F.2d 335 (5th Cir. 1956); *Compare In re Gates,* 478 F.2d 998 (D.C. Cir. 1973); *In re Niblack,* 476 F.2d 930 (D.C. Cir. 1973), *cert. denied,* 414 U.S. 909, 94 S.Ct. 229, 38 L.Ed.2d 147 (1973).

to the doctrine that, absent prejudice or unfairness, failure to follow Rule 42(b) will not result in reversal of a contempt judgment. *Hopkins v. Jarvis,* 648 F.2d 981 (5th Cir. 1981); *F.T.C. v. Gladstone,* 450 F.2d 913 (5th Cir. 1971); *Wolfe v. Coleman,* 681 F.2d 1302 (11th Cir. 1982).

[4] The court did not hold Washington in contempt instanter. He did have notice in fact and an opportunity to be heard. Additionally he had the procedural protections sought to be assured by Rule 42(b). The court read Washington the essential facts constituting criminal contempt and informed him that the charge was criminal contempt. While the court referred to Rule 42(a) as the source of its authority, the defendant was fully informed of the essential elements of the charge against him and its criminal nature.

Appearing as amicus curiae, the State of Texas urges that the failure of a federal court to accord a continuance to a lawyer who is a state legislator prevents the uninterrupted performance of the legislator's duties. It relies on *Tenny v. Brandhove,* 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), which held state legislators immune to civil suit. The rationale of *Tenny* is that immunity to suit enables the people's elected representatives "to execute the functions of their office without fear of prosecutions, civil or criminal."[7]

Requiring a lawyer to adhere to the proper orders of a federal court does not threaten legislative integrity. Senator Washington was not called suddenly to his legis-

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7. 341 U.S. at 374, 71 S.Ct. at 787, 95 L.Ed. at 1025. The state argues against the arrest of a state senator while performing his duty. Washington was not arrested and that issue is not before us.

lative duties, and the federal case was not precipitately assigned for trial. From the time he sought to enter an appearance in the case, in March, Washington knew or should have known of the trial date and of the scheduled, regular legislative session. He had ample time to communicate with the court in person and to seek an alternate trial date. At 10:00 a.m. on April 15, Chief Judge Singleton asked Washington's associate to have Washington communicate with him. The record indicates that Washington failed to do so. In arguing his case to this court, Washington asserts that he made an effort to communicate with the judge but he failed to suggest that extenuating circumstance to the trial court. Chief Judge Singleton did not manifest indifferance to the interests of the State or to the duties of Washington as a legislator. At the hearing on April 22, he said:

> Well, I will say, Mr. Washington, in my relationships with you as an attorney, I was surprised that you did not contact me and we could have probably worked something out. I was a little surprised that you did not contact me. I was a little surprised that you waited until the last hour to file the motion based upon article 21.88(A). Of course, that article is not applicable to federal courts as you, I'm certain, know. But we could have at least attempted to work something out.
>
> But I did not have any idea, from what the records indicated and from what I knew about the case, but that you were going to try the case on Monday, April the 18th. I did not know that. And I did not know to the contrary, as a matter of fact, until I got here on Monday morning, ready to pick a jury.
>
> Mr. Washington: Yes. I take full responsibility, Your Honor. But I was never advised that I should

call this court on Friday. The only reason that I called the court was because Miss Corona [the courtroom deputy] called my office in Houston and they advised me in Austin. And I left three messages on Miss Corona's answering service. We ultimately did speak, and it was late in the afternoon Friday.

But as I say, I take full responsibility, but I was never advised that I should call this court. I would have done so.

The Court: Well, I think you obviously should take full responsibility because you were the attorney of record.

But as I say, I repeat, it seems to me that I would have expected you to file such a motion or to talk to me about it at some time prior to Friday because you knew that the case was set for Monday, April the 18th, and had known it ever since you accepted employment.

Mr. Washington: Yes, sir.

Under these circumstances, the problem was created not by Senator Washington's attention to his state legislative duties but his carelessness concerning his responsibilities as a member of the bar of the federal court. This resulted in a panel of prospective jurors being needlessly summoned to their great personal inconvenience and in expense that could have been averted by simple diligence.

For these reasons the judgment of contempt is AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-83-23

UNITED STATES OF AMERICA

v.

CRAIG WASHINGTON

(Filed April 27, 1983)

ORDER

On April 22, 1983, came on to be heard an Order of this Court directing Attorney CRAIG WASHINGTON to show cause why he should not be held in criminal contempt of this Court pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure. After having received due notice, all parties appeared before the Court. The Court considered evidence of the contempt which had occurred in its presence, as set forth in the six page statement of facts attached hereto, and found that the defendant, CRAIG WASHINGTON, had been guilty of conscious and deliberate contempt through the willful disregard of the Court's authority, in that he failed to appear and represent his client at trial on April 18, 1983, in accordance with the Court's directive. *See Thyssen, Inc. v. S/S Chuen On,* 693 F.2d 1171 (5th Cir. 1982).

Accordingly, it is ORDERED that:

(1) The defendant, CRAIG WASHINGTON, is found to be in contempt of this Court.

(2) The defendant, CRAIG WASHINGTON, is fined the sum of $1,400.00 (One Thousand Four Hundred and No/100 Dollars). This fine shall be tendered to the United States District Clerk within ten (10) days.

The Clerk shall file this Order and provide a true copy to all parties.

DONE at Houston, Texas, this 27th day of April, 1983.

/s/ JOHN V. SINGLETON, JR.
John V. Singleton, Jr.
United States District Judge

The defendant in this case, Mr. Miki Eze Onu, is presently in custody and has remained continuously in custody since January 21, 1983.

It is my judgment that the best way to proceed is for me to state factual matters relating to this case which have transpired in my presence or have been found in court records or were reported to me by my court personnel.

The indictment in this case was returned on February 18, 1983. In accordance with the procedures adopted by the court, the case was assigned to me.

On February 28, 1983, Mr. Onu was arraigned before Magistrate Calvin Botley. At the arraignment, Mr. Onu was represented by his employed attorneys, Mr. Harold Tillman and a Mr. Chargois. The Assistant United States Attorney representing the Government was Mr. Patrick Molloy. On that date, the usual Docket Control Order was prepared by Magistrate Botley, and was signed by the defendant, Mr. Onu, by his attorney, and by Assistant United States Attorney Molloy.

The Docket Control Order was filed among the papers in the case on February 28, 1983. It provided that

1. March 10, 1983, would be the last day motions with briefs may be filed with the District Clerk.
2. March 20, 1983, would be the last day either party may respond to motions.
3. April 13, 1983, at 9:00 a.m., there would be a Pretrial Conference before me.
4. April 13, 1983, would be the last day for filing proposed questions to the jury panel and proposed jury charge.

5. April 18, 1983, at 9:30 a.m., the jury selection and trial would begin.

6. Five days was the estimated trial time.

7. The defendant, Mr. Onu, had signed waiver of right to be tried within time limits as specified by the Speedy Trial Act of 1974.

On March 10, 1983, a motion to substitute council was filed, signed by Mr. Craig Washington and approved by Mr. Harold Tillman. This motion stated that Mr. Washington will hereafter be counsel for the defendant and asked the court to substitute Mr. Washington in place of Mr. Tillman as attorney of record. In accordance with the procedures adopted by me, before counsel is substituted in a case such as this one, the defendant must approve the substitution of counsel. On March 15, my courtroom deputy clerk, Diane Corona, telephoned Mr. Washington's office to request that an affidavit from Mr. Onu be submitted agreeing to the substitution of Mr. Washington as his counsel. Mr. Washington was not in his office and Miss Corona talked to his associate, Mr. Melvin Lampley. Subsequent telephone conversations were made to Mr. Washington's office by Miss Corona before the affidavit was finally received on April 11.

On March 10, 1983, the following motions signed by Mr. Washington were filed: Motion for Discovery and Inspection and Motion to Reduce Bond.

On March 18, 1983, a Motion to Suppress Evidence signed by Mr. Washington was filed.

On March 22, 1983, a Motion for a Bill of Particulars signed by Mr. Washington was filed. This motion indi-

cated that Mr. Washington's signature was by what appears to me to be the initials of Melvin Lampley.

On April 8, 1983, Miss Corona talked to Mr. Washington, advising him of a resetting of the Pretrial Conference to April 15, at 9:30 a.m. Mr. Washington agreed to this date.

On April 11, 1983, the affidavit of Mr. Onu agreeing to substitution of Mr. Washington as his attorney was received by the clerk and filed on that date.

On April 12, 1983, I signed an order substituting Mr. Washington as attorney of record for Mr. Onu. This order was also signed by Mr. Tillman and by Mr. Washington.

On April 15, at 9:30 a.m., a Pretrial Conference was held. Mr. Washington was not present; Mr. Lampley was present in his place. Assistant United States Attorneys Molloy and Scott Woodward were present as well as Miss Corona, and my law clerk working on this case, Ms. Bettina Brownstein. As is usual, a recording was made of this Pretrial Conference. This recording indicates that Mr. Lampley informed me that Mr. Washington would not be present. I informed Mr. Lampley that our rules required that the trial attorney in charge be present for the Pretrial Conference preceding trial; notwithstanding Mr. Washington's absence we proceeded to discuss disposition of the various motions prior to trial time. Mr. Lampley orally presented a Motion for Continuance based upon Article 2168(a), Vernon's Annotated Civil Statutes, as amended, relating to continuances because of an attorney's presence in the legislature. I advised Mr. Lampley that that statute was not applicable to federal courts and that the motion would be denied and asked him to get in

touch with Mr. Washington and ask Mr. Washington to call me. The conference ended at 10:00 a.m. I personally heard nothing from Mr. Washington that day.

About 4:45 on Friday, April 15, Mr. Washington talked to Miss Corona. In this telephone conversation Mr. Washington advised Miss Corona that an Affidavit and Motion for Legislative Continuance would be filed and Miss Corona advised Mr. Washington that it had not been received by her at that time, but upon instructions of Judge Singleton the motion would be denied and the trial would remain as set for Monday, April 18. Mr. Washington then informed Miss Corona that a Motion to Withdraw as Counsel would be submitted to the court on Monday and Mr. Washington informed Miss Corona that he would not be present on Monday, April 18.

At the same time, a motion was filed in the Clerk's Office by Mr. Lampley, which Affidavit and Motion for Legislative Continuance was signed by Mr. Craig Washington and notarized by Roslyn Walker Garcia, Notary Public in and for the State of Texas. The notary's acknowledgement is dated the 9th day of April, 1983, but the Certificate of Service is dated the 15th day of April, 1983, and it was filed by the clerk on April 15, 1983. This motion contains the following representations:

I.

> I am counsel of record for the above referenced party to this case. I intend to actively participate in the preparation and presentation of this cause.

II.

> I am an elected member of the Texas Senate, 68th Legislature, Regular Session, which convened

January 11, 1983. I request that this cause be continued until a time at least thirty (30) days after the adjournment of the Regular Session, pursuant to Article 21.68(a), Vernon's Annotated Civil Statutes, as amended.

On Monday, April 18, 1983, at 9:30 a.m., a Pretrial Conference was held at which Assistant United States Attorneys Molloy and Woodward, Mr. Lampley, Miss Corona, and Ms. Brownstein were present. This was the first time that I learned that Mr. Washington would not be present. No motion to substitute counsel was presented at that time, either orally or in writing.

A Motion to Withdraw as Counsel was filed at the Pretrial Conference, in which motion Mr. Washington stated that he desired to withdraw because the defendant had defaulted in his obligation to pay Mr. Washington the agreed upon attorney's fee in the amount of $25,000. The motion stated that Mr. Onu had paid $2,000 but had failed to pay the balance. The motion reflected that Mr. Washington was now suing Mr. Onu for work done which was in excess of the amount paid by Mr. Onu and it would be a conflict of interest to continue representing him at this time. I denied this motion.

At the Pretrial Conference, I called the Chief Deputy United States Marshal, Mr. Jim Schlecht, and in the presence of Mr. Lampley, Assistant United States Attorneys Molloy and Woodward and Miss Corona I asked Mr. Schlecht to bring Mr. Washington before me.

I then went into the courtroom and advised the thirty-five jurors who were awaiting jury selection that they would not be needed and that the case would not go to

trial because the attorney representing the defendant had not appeared.

On Monday afternoon, I received a telephone call from Attorney General Mattox. As a result of this call, it was agreed that Mr. Washington would be present in my courtroom at 9:00 a.m. on Friday, April 22, 1983. I then contacted the United States Marshal and rescinded my order requiring Mr. Washington to be brought before me.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83 2270

D. C. Docket No. CR-H 83 23

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MIKI EZE ONU,
Defendant,

CRAIG WASHINGTON,
Appellant

Appeal from the United States District Court for the
Southern District of Texas

(Filed May 14, 1984)

Before RUBIN, JOHNSON and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APRIL 19, 1984

ISSUED AS MANDATE: MAY 11, 1984

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CR. NO. H-83-23

IN RE: CRAIG WASHINGTON

TRANSCRIPT OF PROCEEDING

CONTEMPT HEARING

APRIL 22, 1983

Before: Hon. John V. Singleton, Chief Judge.

Yvette F. Perry
U.S. Court Reporter
515 Rusk
Houston, Texas 77002
[713] 224-8656

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CR. NO. H-83-23

IN RE: CRAIG WASHINGTON

I, Yvette F. Perry, Official Court Reporter for the United States District Court for the Southern District of Texas, Houston Division, do hereby certify that the following is a true and complete transcript of the poceedings had in the above-styled and numbered cause before the Honorable John V. Singleton, United States District Judge, on the 22nd day of April, 1983.

Witness my official hand at my office in Houston, Harris County, Texas, on this the 25th day of May, A.D., 1983.

/s/ YVETTE F. PERRY
Official Court Reporter

PROCEEDINGS

The Court: Please be seated, ladies and gentlemen.

Good morning, Mr. Washington.

Mr. Washington: Good morning, Your Honor.

The Court: Mr. Washington, Miss Corona will hand you what I'm getting ready to read so you can follow it.

Mr. Washington: Yes sir. Thank you.

The Court: The defendant in this case, Mr. Mike Eze Onu, is presently in custody and has remained continuously in custody since January the 21st, 1983.

It is my judgment that the best way to proceed is for me to state factual matters relating to this case which have transpired in my presence or have been found in court records or were reported to me by my court personnel.

The indictment in this case was returned February the 18th, 1983. In accordance with the procedures adopted by the court, the case was assigned to me.

On February the 28th, 1983, Mr. Onu was arraigned before Magistrate Calvin Botley. At the arraignment, Mr. Onu was represented by his employed attorneys, Mr. Harold Tillman and a Mr. Chargois. The Assistant United States attorney representing the Government was Mr. Patrick Molloy. On that date, the usual Docket Control Order was prepared by Magistrate Botley, and was signed by the defendant, Mr. Onu, by his attorney, and by Assistant United States Attorney Molloy.

The Docket Control Order was filed among the papers in the case on February the 28th, 1983. It provided that:

1. March 10th, 1983, may be the last day motions with briefs would be filed with the district clerk.

2. March the 20th, 1983, would be the last day either party would respond to motions.

3. April 13, 1983, at 9 o'clock a.m. there would be a Pretrial Conference before me.

4. April the 13th, 1983, would be the last day for filing proposed questions to the jury panel and proposed jury charge.

5. April 18th, 1983, at 9:30 a.m. jury selection and trial would begin.

Five days was the estimated trial time.

The defendant Mr. Onu, had signed waiver of right to be tried within time limits as specified by The Speedy Trial Act of 1974.

On March 10, 1983, a Motion to Substitute Counsel was filed, signed by Mr. Craig Washington and approved by Mr. Harold Tillman. This motion stated that Mr. Washington will hereafter be counsel for the defendant and asked the court to substitute Mr. Washington in place of Mr. Tillman as attorney of record.

In accordance with the procedures adopted by me, before counsel is substituted in a case such as this one, the defendant must approve the substitution of counsel.

On March 15th, my Courtroom Deputy, Diane Corona, telephoned Mr. Washington's office to request that an affidavit from Mr. Onu be submitted agreeing to the substitution of Mr. Washington as his counsel. Mr. Washington was not in his office and Miss Corona talked to his

associate, Mr. Melvin Lampley. Subsequent telephone conversations were made to Mr. Washington's office by Miss Corona before the affidavit was finally received on April the 11th.

On March 10th, 1983, the following motions signed by Mr. Washington were filed: Motion for Discovery and Inspection and Motion to Reduce Bond.

On March 18th, 1983, a Motion to Suppress Evidence signed by Mr. Washington was filed.

On March 22, 1983, a Motion for a Bill of Particulars signed by Mr. Washington was filed. This motion indicated that Mr. Washington's signature was by what appears to me to be the initials of Melvin Lampley.

On April 8th, 1983, Miss Corona talked to Mr. Washington, advising him of a resetting of the Pretrial Conference to April the 15th at 9:30 a.m. Mr. Washington agreed to this date.

On April the 11th, 1983, the affidavit of Mr. Onu agreeing to the substitution of Mr. Washington as his attorney was received by the clerk and filed on that date.

On April the 12th, 1983, I signed an order substituting Mr. Washington as attorney of record for Mr. Onu. This order was also signed by Mr. Tillman and by Mr. Washington.

On April 15th at 9:30 a.m. a Pretrial Conference was held. Mr. Washington was not present. Mr. Lampley was present in his place.

Assistant United States Attorneys Molloy and Scott Woodward were present as well as Miss Corona and my law clerk working on this case, Ms. Bettina Brownstein.

As is usual, a recording was made of this Pretrial Conference. This recording indicates that Mr. Lampley informed me that Mr. Washington would not be present. I informed Mr. Lampley that our rules required that the trial attorney in charge be present for the Pretrial Conference preceding trial; notwithstanding Mr. Washington's absence, we proceeded to discuss disposition of the various motions prior to trial time. Mr. Lampley orally presented a Motion for Continuance based upon Article 2168(a), Vernon's Annotated Civil Statutes, as amended, relating to continuances because of an attorney's presence in the legislature. I advised Mr. Lampley that that statute was not applicable to federal courts and that the motion would be denied and asked him to get in touch with Mr. Washington and ask Mr. Washington to call me. The conference ended at 10 a.m. I personally heard nothing from Mr. Washington that day.

About 4:45 on Friday, April 15, Mr. Washington talked to Miss Corona. In this telephone conversation Mr. Washington advised Miss Corona that an affidavit and motion for legislative continuance would be filed and Miss Corona advised Mr. Washington that it had not been received by her at that time, but upon instructions of Judge Singleton the motion would be denied and the trial would remain as set for Monday, April the 18th.

Mr. Washington then informed Miss Corona that a motion to withdraw as counsel would be submitted to the court on Monday and Mr. Washington informed Miss Corona that he would not be present on Monday, April the 18th.

At the same time, a motion was filed in the clerk's office by Mr. Lampley, which affidavit and Motion for Legis-

lative Continuance was signed by Mr. Craig Washington and notorized by Roslyn Walker Garcia, a notary public in and for the State of Texas. The notary's acknowledgment is dated the 9th day of April, 1983, but the certificate of service is dated the 15th day of April, 1983, and it was filed by the clerk on April the 15th, 1983. This motion contains the following representations:

1. I am counsel of record for the above referenced party to this case. I intend to actively participate in the preparation and presentation of this cause.

2. I am an elected member of the Texas Senate, 68th Legislature, Regular Session, which convened January the 11th, 1983. I request that this cause be continued until a time at least 30 days after the adjournment of the regular session, pursuant to Article 21.68(a) Vernon's Annotated Civil Statutes, as amended.

On Monday April the 18th, 1983, at 9:30 a.m., a pretrial conference was held at which Assistant United States Attorneys Molloy, and Woodward, Mr. Lampley, Miss Corona and Ms. Brownstein were present. This was the first time that I learned that Mr. Washington would not be present. No motion to substitute counsel was presented at that time either orally or in writing.

A motion to withdraw as counsel was filed at the pretrial conference, in which motion Mr. Washington stated that he desired to withdraw because the defendant had defaulted in his obligation to pay Mr. Washington the agreed upon attorney's fees in the amount of $25,000. The motion stated that Mr. Onu had paid $2,000 but had failed to pay the balance. The motion reflected that Mr. Washington was now suing Mr. Onu for work done

which was in excess of the amount paid by Mr. Onu and it would be a conflict of interest to continue to represent him at this time. I denied this motion.

At the pretrial conference, I called the Chief Deputy United States Marshal, Mr. Jim Schlecht, and in the presence of Mr. Lampley, Assistant United States Attorneys Molloy, Woodward and Miss Corona, I asked Mr. Schlecht to bring Mr. Washington before me.

I then went into the courtroom and advised the 35 jurors who were awaiting jury selection that they would not be needed and that the case would not go to trial because the attorney representing the defendant had not appeared.

On Monday afternoon I received a telephone call from Attorney General Mattox. As a result of this call, it was agreed that Mr. Washington would be present in my courtroom at 9:00 a.m. on Friday, April the 22nd, 1983. I then contacted the United States Marshal and rescinded my order requiring Mr. Washington to be brought before me.

Mr. Washington, do you have any corrections or additions that you wish to make to those matters that appear of record or that have been reported to me?

Mr. Washington: I have none, your Honor, except that I cannot vouch for those statements that obviously did not occur in my presence.

The Court: Well, do you have anything to say about the matters that you did file over your signature?

Mr. Washington: No, sir. The only explanation, as far as the motion for legislative continuance, it was

signed by me on the date that it was notorized. I have no explanation as to why it was not filed until apparently some days afterwards. You have noted in the memorandum here, this recitation of facts, that there was four or five days between the signing and notorization by me and the time that the certificate of service in the case was filed. I was not present in Houston and I do not know why there was a time delay.

The Court: It was not mailed. It was hand delivered. The motion was not mailed. It was hand delivered and received in the Clerk's office at about 5:00 o'clock on Friday, April the 18th.

Mr. Washington: Yes, sir.

The Court: I mean, Friday, April the 15th. The main consideration—well, one of the primary considerations that is facing this Court is the status of the defendant, Mr. Onu, who is in custody and awaiting to be tried.

What do you propose to do about that?

Mr. Washington: Well, I would do whatever the Court wishes. I indicated—I should indicate now that it's my position that Mr. Onu has not discharged his responsibility. If the Court requires that we undertake the obligation of representing Mr. Onu, then I would ask that the Court allow, pursuant to the local rules, an associate, another partner as a matter of fact, in my firm, to try the case. If that is not your desire, then I have no choice except to try the case.

The Court: The Court has no position on that. That is primarily up to the defendant in the case who employed the attorney. The records indicate that Mr. Onu em-

ployed you as his attorney. If it is agreeable to Mr. Onu to substitute another trial attorney, that would be all right with the Court. But that would have to be some sort of—an affidavit from Mr. Onu agreeing to the substitution of another attorney would have to be filed.

Mr. Onu is here, present. I had him brought here today, and if you want to work that out with Mr. Onu, that's fine.

I feel that because of the recitations that are contained in this statement of the records as they appear and what occurred in my presence and what has been reported to me by court personnel, that I have no alternative but to hold you in contempt in accordance with Rule 42(a), I believe it is, and I will tell you that the rule says that, 42(a) of the Rules of Criminal Procedure, provides that "a criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

I have not done that yet. I will prepare such an order and I will tell you that the punishment for the contempt will be a fine. The amount of the fine will be $1400, because that is the estimated amount that it cost the government to bring into Court Monday 35 jurors, and to pay for their service and their mileage and their parking. It has been estimated that the amount is in the neighborhood of $1400, and that will be the punishment for the contempt that the Court has found in accordance with Rule 42(a).

Now, since Mr. Onu is here, I think you ought to get with Mr. Onu. I am concerned, as I would be concerned of any person in custody, that we—and the intent of the Speedy Trial Act, although Mr. Onu signed the waiver, I don't know, I have not had before me the situation to where—have not had a situation so that I can determine accurately and authoritatively that a defendant in custody can waive the 90-day provision of the Speedy Trial Act.

As you know, the Act requires that for persons in custody, that the trial be held within 90 days from the date the person went in custody.

I am told by the Assistant United States Attorney that ways can be—that you can include in the excludable delay time sufficient to overcome the 90-day rule. The 90 days in this case would be up on April the 29th. I had hoped to have Mr. Onu tried by April the 29th.

I would like for you, Mr. Washington, to get with Mr. Onu. If it's all right with Mr. Onu for Mr. Lampley to represent him in the trial, then we can arrange for the trial and dispose of the trial before the 90 days is up.

If it's not all right with Mr. Onu, I will work with you in any way that I can to let you discharge your duties as the attorney for Mr. Onu in this case as well as discharge your duties as an elected representative to the State Senate.

We could, for example, pick a jury and pick the jury before April the 29th. That would stop the running of the 90 days. And then we could set the trial setting at a time later.

Mr. Washington: Yes, sir.

The Court: But since you are here and Mr. Onu is here, you would work that out with Mr. Onu.

Mr. Washington: Yes, sir.

The Court: And then we can work out a trial setting of this case.

Mr. Washington: Yes, sir.

The Court: Anything else?

Mr. Washington: I have one question, if I may, your Honor.

The Court: Yes, sir.

Mr. Washington: To whom should I make the check payable?

The Court: I'm sorry. I was saying the fine is in the amount of $1400, and the order that I had contemplated entering, which I will have to enter in accordance with the rule in writing, would give you ten days to pay the amount of the fine.

Mr. Washington: Yes, sir.

The Court: It would be payable within ten days from today.

Mr. Washington: Payable to the United States?

The Court: United States District Clerk.

Mr. Washington: Yes, sir.

The Court: I guess it would be payable to Jesse Clark, Clerk, in and for the Southern District of Texas.

Mr. Washington: Yes, sir.

The Court: All right. Anything further?

Mr. Washington: I have nothing further, your Honor.

The Court: I'll be here. I wish—while you're here now, I expect you to get with Mr. Onu. Diane, where is Mr. Onu?

Deputy Courtroom Clerk: He's in the Marshal's office.

The Court: In the Marshal's office?

Deputy Courtroom Clerk: Yes.

The Court: Would you get Mr. Onu and bring him down here into this courtroom?

The U.S. Marshal: We can, Your Honor.

The Court: So he can meet with Mr. Washington?

The U.S. Marshal: Fine.

The Court: If they want to use the jury room back there, they can do so and work this out with Mr. Onu about whether he wants you to try it. And if you try it, then we can work out, I think, a situation to where we can pick a jury at some time and have the trial setting at some later date, or if Mr. Lampley is going to try the case, we can work with Miss Corona and actually set a trial setting, probably next Monday.

Isn't that right, Diane?

Deputy Courtroom Clerk: Yes.

The Court: Probably Monday. Okay.

Mr. Washington: May I address the court, Your Honor?

The Court: Yes.

Mr. Washington: I apologize for anything that I've done or failed to do in the court's opinion ever attempted to bring dishonor upon this court or myself.

I have, as the court may know, nothing but the highest regard and respect for the court as an individual and as, obviously, as the court. And I would say that in spite of your finding, I would tell you that I have never in my life done anything or attempted to do anything that I thought would bring dishonor or disrespect upon this court.

The Court: Well, I will say, Mr. Washington, in my relationships with you as an attorney, I was surprised that you did not contact me and we could have probably worked something out. I was a little surprised that you did not contact me. I was a little surprised that you waited until the last hour to file the motion based upon Article 21.68(a). Of course, that article is not applicable to federal courts as you, I'm certain, know. But we could have at least attempted to work something out.

But I did not have any idea, from what the records indicated and from what I knew about the case, but that you were going to try the case on Monday, April the 18th. I did not know that. And I did not know to the contrary, as a matter of fact, until I got here on Monday morning, ready to pick a jury.

Mr. Washington: Yes. I take full responsibility, Your Honor. But I was never advised that I should call this court on Friday. The only reason that I called the court was because Miss Corona called my office in Houston and they advised me in Austin. And I left three messages on Miss Corona's answering service. We ultimately did speak, and it was late in the afternoon on Friday.

But as I say, I take full responsibility, but I was never advised that I should call this court. I would have done so?

The Court: Well, I think you obviously should take full responsibility because you were the attorney of record.

But as I say, I repeat, it seems to me that I would have expected you to file such a motion or to talk to me about it at some time prior to Friday because you knew that the case was set for Monday, April the 18th, and had known it ever since you accepted employment.

Mr. Washington: Yes, sir.

The Court: Okay. Thank you very much.

Mr. Washington: Thank you, Your Honor. May I be excused?

The Court: Yes, sir. Well, you may be excused except I want you to wait and talk to Mr. Onu.

Mr. Washington: Yes, sir.

The Court: Okay?

Mr. Washington: Yes, sir.

The Court: Thank you.

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